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No. 1210

In the Supreme Court of the United States

OCTOBER TERM, 1969

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., ET AL., PETITIONERS

v.

GEORGE ROMNEY, SECRETARY OF UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT SECRETARY OF HOUSING AND URBAN DEVELOPMENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. A-47-60) is not reported. The opinion of the court of appeals (Pet. App. A-61-64) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1969. The petition for a writ of certiorari was filed on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 106 of the National Historic Preservation Act of 1966 provides that the head of any federal agency having jurisdiction over a federally-assisted undertaking must "prior to the approval of the expenditure of any Federal funds on the undertaking * * * take into account the effect of the undertaking on any" building listed on the National Register of Historic Places and give the Advisory Council on Historic Preservation (which administers the Register) the opportunity to comment thereon. The questions presented are:

1. Whether private associations and individuals concerned with historical preservation but who do not own buildings affected by a federally-assisted undertaking have sufficient legal interests to permit them to enjoin alleged violations of Section 106.

2. Whether the Secretary of Housing and Urban Development must follow the requirements of Section 106 in connection with the impending demolition of historic buildings listed on the National Register when the expenditure of federal funds on an urban renewal plan involving the destruction of these buildings was approved by the Secretary prior to the listing of such buildings on the Register.

STATUTE INVOLVED

Section 106 of the National Historic Preservation Act, 16 U.S.C. (Supp. IV) 470(f), provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i-470m of this title a reasonable opportunity to comment with regard to such undertaking.

STATEMENT

Petitioners brought this action against respondent George Romney, Secretary of Housing and Urban Development ("HUD"), respondent Lexington (Kentucky) Urban Renewal Agency, and certain other respondents, to enjoin the destruction of seven buildings in the carrying out of an urban renewal plan for downtown Lexington. The gravamen of petitioners' complaint is that HUD failed to consider the effect of the plan upon the buildings and to notify the Advisory Council on Historic Preservation of the proposed demolition. The buildings were part of the "West High Street Historic District," which was placed on the National Register of Historic Places on July 10, 1969, pursuant to the National Historic Preservation Act of 1966 (Pet. App. A-27-43). That was approximately two months

after HUD finally approved the amended urban renewal plan.

Petitioners South Hill Neighborhood Association and Bluegrass Trust for Historic Preservation have as a common purpose the preservation of historic buildings in Kentucky (Pet. App. A-48). Neither owns or has ever owned any property in the area of controversy (*ibid.*). Petitioner Curtis Harrison is president of South Hill Neighborhood Association, a citizen and a taxpayer but not a resident or owner of any of the buildings on the Register (*ibid.*). Petitioners Stathis Kafoglis and W. T. Dennis and his wife are citizens and taxpayers and owners of property within the area in controversy (*ibid.*). The district court found that none of the petitioners owned or have owned any of the seven buildings when they were placed on the National Register (Pet. App. A-56).

In July, 1965, pursuant to due notice given each property owner within the area in controversy (including petitioners Kafoglis and Dennis), urban renewal plan Ky. R-63 was approved by Kentucky officials (Pet. App. A-49). This plan provided that all land acquired within the project area would be cleared of all improvements (including the seven buildings) and thereafter would be used for commercial purposes (*ibid.*). This plan was submitted to HUD, which, on June 7, 1966, approved it and authorized federal funding for the project (*ibid.*).

Shortly thereafter, the plan was amended to permit, *inter alia*, an alternative use of historic preservation for the block in which the seven buildings

were located (Pet. App. A-49-50). This plan provided that these buildings would be allowed to remain if they would be restored in conformity with standards of rehabilitation established by the Lexington Urban Renewal Agency; but that if the buildings were not restored, they would be demolished (Pet. App. A-50). HUD approved the amended plan on October 18, 1968 (*ibid.*). The district court found that none of the petitioners submitted a plan for restoration of the buildings (Pet. App. A-58).

In January 1969, the plan was again amended in minor respects not pertinent here. These amendments retained the alternate use for historic preservation for the buildings (Pet. App. A-50). HUD approved the second amendment in May 1969 (*ibid.*).[1]

The fourteen buildings comprising the West High Street Historic District (which included the seven buildings involved here) were placed on the Register on July 10, 1969 (Pet. App. A-58). By that time, the Lexington Urban Renewal Agency had acquired title to all those buildings (note 1, *supra*).

No plan of restoration acceptable to local authorities was submitted. The Lexington Urban Renewal Agency accepted a proposal for construction of commercial buildings in the area in controversy and entered into a contract with the successful bidder which contemplated, among other things, demolition of the seven buildings (Pet. App. A-51).

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[1] In February 1969, the Lexington Urban Agency had acquired title to the buildings (Pet. App. A-32).

On October 15, 1969, with the approval of HUD, demolition was begun on the seven buildings, as a result of which one was totally destroyed and two others damaged (Pet. App. A-51). Petitioners brought a State court action to enjoin the project, and the court issued a temporary restraining order against further demolition (Pet. App. A-4), which it dissolved upon determining that petitioners had failed to state a claim on which relief could be granted under Kentucky law (Pet. App. A-5-9).

Petitioners then brought the instant action in the federal district court, seeking injunctive and declaratory relief. They alleged that HUD had violated Section 106 of the National Historic Preservation Act by failing to consider the effect of the plan upon the buildings and by failing to notify the Advisory Council on Historic Preservation of the proposed demolition. The district court dismissed the complaint, ruling both that petitioners lacked standing to maintain the action and that HUD's actions did not violate Section 106.

The court held that petitioners lacked standing as taxpayers because their allegations had "established neither a logical link between their taxpayer status and the type of legislative enactment attacked nor a nexus between their taxpayer status and the precise nature of the constitutional infringement alleged"; and that since none of them had ever held title to any of the seven buildings, none had "any real interest in this litigation" (Pet. App. A-56). On the merits, the court noted that HUD's initial approval of urban renewal plan Ky. R-63 and its subsequent

approval of later amendments all occurred before any of the buildings had been placed on the National Register (Pet. App. A-59). The court concluded that Section 106 "and the duty contained therein refers only to times when plans or amendments to plans are authorized and resulting loan and capital grant contracts are entered between HUD and local urban renewal agencies" and not to every subsequent step in the carrying out of previously-approved urban renewal plans (*ibid.*).

The court of appeals affirmed, primarily on the basis of the district court's opinion (Pet. App. A-64).

ARGUMENT

Although the test of standing that the district court applied here was more restricted than that subsequently announced by this Court in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, No. 85, O. T., 1969, decided March 3, 1970, we submit that the district court properly dismissed the complaint because (1) petitioners failed to show that they had a sufficient legal interest to entitle them to enjoin this urban renewal project and (2) the actions of HUD that petitioners challenge did not violate Section 106.

1. In the *Data Processing* case, the Court held (slip op., pp. 3-4) that the question of standing "concerns * * * whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. * * *

That interest, at times, may reflect 'aesthetic conservational, and recreational' as well as economic values." Under this standard, at least some of the petitioners would appear to have standing to challenge HUD's approval of the urban renewal project.

Data Processing further held, however, that before persons with standing can prevail on the merits they must show not only a statutory violation but also that the statute involved gives them "a 'legal interest' which protects them against violations of those Acts" (slip op., p. 7). Petitioners have not shown that the action of HUD about which they complain has invaded any such "legal interest." As the district court pointed out, petitioners have no legal interest in compelling HUD to carry out the requirements of Section 106. Unlike the situation in *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (C.A. 2), none of the petitioners here is a resident displaced by the Lexington urban renewal plan, whose stake in the outcome of litigation would be far more personal and immediate than the purely aesthetic interests claimed to be invaded here. Petitioners Dennis and Kafoglis, the only owners of any property in the area, have already had adequate opportunity to protect their interests by participating in condemnation proceedings before the state courts (Pet. App. A-10-24). *Green Street Association* v. *Daley*, 373 F. 2d 1 (C.A. 7).

2. The courts below correctly held that HUD had not violated Section 106 of the National Historic Preservation Act. The requirements that that section imposes upon the Secretary—that he "take into account

the effect" of a federally-assisted undertaking upon any building that is listed on the National Register and give the Advisory Council "a reasonable opportunity to comment" about such undertaking—apply only "prior to the approval of the expenditure of any Federal funds on the undertaking." When HUD approved this urban renewal plan—both initially and the two amendments—the buildings here involved had not yet been placed on the National Register. The HUD approval, of course, covered not only the terms of the plan but also the expenditure of the federal funds involved.

The contrary interpretation of Section 106 that petitioners urge would seriously interfere with the effective functioning of the urban renewal program and would cause serious administrative problems. If petitioners are suggesting that before approving a plan HUD must determine not only whether any buildings in the area are listed on the Register but also whether there are other historic buildings in the area that might later be placed on the Register, the procedure would be unwieldy and result in substantial delay. Alternatively, if petitioners are arguing that after approving a plan HUD must check the Register each time that a further implementing step is proposed to be taken, this, too, would cause delay and serious administrative problems—particularly so since such implementing steps ordinarily are taken directly by the local authority rather than by HUD.

In short, the statute means what it says: that the Secretary's obligations under Section 106 relate only

to buildings that are on the Register at the time HUD finally approves a plan. There is no violation of Section 106 where, as here, HUD's last approval of the plan occurred before the buildings in the area involved had been listed on the Register.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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